5-20-2009

Idaho Dairymen's Ass'n v. Gooding County Amicus Brief Dckt. 35980

IN THE SUPREME COURT OF THE STATE OF IDAHO

IDAHO DAIRYMEN'S ASSOCIATION, INC., an Idaho non-profit corporation; THE IDAHO CATTLE ASSOCIATION, INC., an Idaho non-profit corporation,

Petitioner,

vs.

GOODING COUNTY, a body politic and corporate of the State of Idaho,

Respondents.

Supreme Court No. 35980

BRIEF OF AMICUS CURIAE
IDAHO ASSOCIATIONS OF COUNTIES, INC.

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING

HONORABLE R. BARRY WOOD
District Judge

Mr. Kenneth R. McClure
Ms. Debora K. Kristensen
Mr. J. Will Varin
Givens Pursley, LLP
601 West Bannock Street
P.O. Box 2720
Boise, ID 83701-2720
Attorneys for Appellants IDA/ICA

Mr. Calvin H. Campbell
Mr. John L. Horgan
Gooding Counting Prosecuting Attorney
624 Main Street
P.O. Box 86
Gooding, ID 83330
Attorneys for Respondent Gooding County

Mr. Michael J. Kane
Michael Kane & Associates, PLLC
1087 West River Street, Suite 100
P. O. Box 2865
Boise, ID 83701
Attorney for Idaho Association of Counties

Mr. Alfred E. Barrus
Mr. Blaine P. Cannon
Mr. Robert Hemsley
Cassia County Prosecuting Attorney
1918 Overland Avenue
P. O. Box 7
Burley, ID 83318
Attorneys for Cassia County

TABLE OF CONTENTS

Page

TABLE OF CASES AND AUTHORITIES ii

I. INTRODUCTION 1

II. ARGUMENT 2

A. The Law of Preemption 2

B. The IDA/ICA's Argument 6

C. The Federal Law 7

D. The Dairy Act 8

E. Rules Governing Dairy Waste 10

F. The Beef Cattle Act 10

G. Rules Governing Beef Cattle Animal Feeding Operations 12

H. The Local Land Use and Planning Act (*LLUPA*) and The *CAFO Siting Act* 12

I. County Law 17

J. There is No Field Preemption in This Matter 18

K. Preemption is Neither Required Nor Desirable 20

III. CONCLUSION 21

CERTIFICATE OF SERVICE 23

TABLE OF CASES AND AUTHORITIES

Page(s)

CASES:

Benewah County Cattlemen's Ass'n, Inc. v. Bd. of County Comm'rs of Benewah County, 105 Idaho 209, 668 P.2d 85 (1983) 5, 6
Envirosafe Serv. of Idaho, Inc. v. County of Owyhee, 112 Idaho 687, 735 P.2d 998 (1987) 1, 2, 3, 4, 5, 19, 20, 21
Idaho Commission on Human Rights v. Campbell, 95 Idaho 215, 506 P.2d 112 (1973) 11
Olson v. Ada County, 105 Idaho 18, 21, 665 P.2d 717 (1983) 15
Ralph Naylor Farms, LLC, v. Latah County, 144 Idaho 806, 811, 172 P.3d 1081 (2007) 13
Shillingford v. Benewah County, 48 Idaho 447, 282 P. 864 (1929) 17
State ex rel. Wright v. Headrick, 65 Idaho 148, 139 P.2d 761 (1943) 17
State v. Poynter, 70 Idaho 438, 220 P.2d 386 (1950) 18
Township of Cascade v. Cascade Resource Recovery, Inc., 325 N.W.2d 500 (Mich. 1982) 21
Voyles v. City of Nampa, 97 Idaho 597, 548 P.2d 1217 (1976) 17
White v. Bannock County Commissioners, 139 Idaho 396, 80 P.3d 332 (2003) 13
Worley Highway Dist. v. Kootenai County, 104 Idaho 833, 633 P.2d 1135 (Ct. App. 1983) 13

STATUTES:

40 C.F.R. § 122.42(e)(1) 11
Idaho Code § 22-4901, *et seq.*, Beef Cattle Environmental Control Act (the Beef Cattle Act) 10
Idaho Code § 22-4902 11
Idaho Code § 22-4902(2) 10, 11
Idaho Code § 22-4904(11) 11
Idaho Code § 22-4906 10
Idaho Code § 31-601 17
Idaho Code § 31-604 18
Idaho Code § 31-714 18
Idaho Code § 37-401, *et seq.*, Sanitary Inspection of Dairy Products Act (the Dairy Act) 8
Idaho Code § 37-401[(4)] 8
Idaho Code § 37-401[(6)] 9
Idaho Code § 37-401[(7)](b) 9
Idaho Code § 37-406 9
Idaho Code § 67-6501, *et seq.*, Local Land Use and Planning Act (LLUPA) 1
Idaho Code § 67-6502 ..... 12, 13
Idaho Code § 67-6508 ..... 13, 14
Idaho Code § 67-6508(f) 13
Idaho Code § 67-6508(h) 13
Idaho Code § 67-6508(j) 14
Idaho Code § 67-6508(k) 14

TABLE OF CASES AND AUTHORITIES (cont.)

Idaho Code § 67-6511 14
Idaho Code § 67-6518 ..... 13, 14
Idaho Code § 67-6528 14
Idaho Code § 67-6529 15
Idaho Code § 67-6529(1) 14
Idaho Code § 67-6529(2) 15
Idaho Code §§ 67-6529A - 67-6529G 15
Idaho Code § 67-6529B(1) 15
Idaho Code § 67-6529B(2) 15
Idaho Code § 67-6529C(2) 16
Idaho Code § 67-6529C(3) 16
Idaho Code § 67-6529D(1) 16
Idaho Code § 67-6529D(3) 16
Idaho Code § 67-6529F(1) 16
Idaho Code § 67-6529G 16
Idaho Code § 67-6537(1) 17
Idaho Code § 67-6537(4) 17

RULES:

IDAPA 02.04.14 10
IDAPA 02.04.15 12
IDAPA 02.04.18 16
IDAPA 02.04.18.100.02(a) 16
IDAPA 02.04.18.300.05 16
IDAPA 02.04.18.300.06 16
IDAPA Temporary Rule 02.04.14.010.14 10

CONSTITUTION:

Idaho Constitution, Article XII, § 2 ..... 2, 17
Idaho Constitution, Article XVIII, § 6 17
Idaho Constitution, Article XVIII, § 11 17

I.

INTRODUCTION

The Idaho Association of Counties (Counties) asked this court to allow the filing of an *amicus curiae* brief because the Counties have deep concerns about the argument presented by the Appellants, Idaho Dairymen's Association and Idaho Cattle Association, Inc. (collectively "IDA/ICA"), pertaining to implied preemption. IDA/ICA bases its argument primarily on one case *Envirosafe Serv. of Idaho, Inc. v. County of Owyhee*, 112 Idaho 687, 735 P.2d 998 (1987). This case had nothing whatsoever to do with Confined Animal Feeding Operations (CAFOs) and dealt with a situation where a county copied a series of state laws verbatim in order to extract a local fee from companies engaging in hazardous waste management. As will be seen below, there are no parallels to be found in county regulation of CAFOs.

In making their argument, IDA/ICA expands their notion of water quality to include the siting of CAFOs in proximity with canyon rims or floodplains and the regulation of animal density. Because these regulations somehow touch upon the expansive definition of "water quality," the Counties are forbidden, their argument goes, to make such regulations based upon the unexpressed but implied preemption by the state laws. The Counties assert that there is no implied preemption in this matter, and that the *Envirosafe* case, if anything, supports the Counties' position, not that of the IDA/ICA.

As a backup argument, the IDA/ICA asks this court to create legislative policy by finding that state regulation of CAFOs is demanded based upon a perceived need for identical regulations throughout the state. The Counties respond that the Local Land Use and Planning Act, Idaho Code § 67-6501, *et seq.* (LLUPA), is specifically designed to allow for differences between local jurisdictions. Matters of concern to the water rich northern counties may have no

application in the desert regions of the state. Clearly, there must be latitude granted to individual counties to apply regulations to CAFOs as they meet the health and safety needs of county citizenry. It is for this reason that the Counties ask this court to reject the notion that the state either has impliedly preempted or should preempt CAFO regulation.

II.

ARGUMENT

A. The Law of Preemption.

Article XII, section 2, of the Idaho Constitution, states that "[a]ny county ... may make and enforce, within its limits, all such local police, sanitary and other regulations as are not in conflict with its charter or with the general laws." A county ordinance expressly permitting what a state law does not, and vice versa, is in direct conflict with state law and will be preempted. *Envirosafe Serv. of Idaho, Inc. v. County of Owyhee*, 112 Idaho 687, 689, 735 P.2d 998, 1000 (1987). However, pursuant to the doctrine of implied preemption, a county ordinance may be preempted by state law even if it is not directly in conflict with state law. *Id.*

> Where it can be inferred from a state statute that the state has intended to fully occupy or preempt a particular area, to the exclusion of [local governmental entities], a [local] ordinance in that area will be held to be in conflict with the state law, even if the state law does not so specifically state.

Id. (citing *Caesar v. State*, 101 Idaho 158, 161, 610 P.2d 517, 520 (1980)). Implied preemption usually applies when "the state has acted in the area in such a pervasive manner that it must be assumed that it intended to occupy the entire field of regulation." *Id.* As a result, a county may not enact an ordinance in an area that state law has '"so completely covered"' such that '"it is a matter of state concern."' *Id.* (quoting *Caesar*, 101 Idaho at 161, 610 P.2d at 520). In addition, if "the nature of the subject matter regulated calls for a uniform sate regulatory scheme,

supplemental local ordinances are preempted." *Id.* (citing *Township of Cascade v. Cascade, Resource Recovery Inc.*, 118 Mich.App. 580, 325 N.W.2d 500, 502 (Mich.App. 1982)).

In *Envirosafe*, Owyhee County enacted an ordinance that regulated the disposal of hazardous and non-hazardous waste, including polychlorinated biphenyls (PCBs). *Id.* at 999, 688. Envirosafe operated two hazardous waste facilities in the county and was subject to the requirements of the ordinance. *Id.* It argued that the Hazardous Waste Management Act of 1983 ("HWMA") preempted the county ordinance, making it void. *Id.* at 1000, 689. The Court noted that the HWMA did not expressly preempt the county ordinance, but contained the following language from Idaho Code § 39-4404 which was persuasive in finding the HWMA impliedly preempted the ordinance:

> "The legislature intends that the State of Idaho enact and carry out a hazardous waste program that will enable *the state* to assume primacy over hazardous waste control from the federal government.... By the provisions of this chapter, the legislature desires to avoid the existence of duplicative, overlapping or conflicting state and federal regulatory systems...." (emphasis added)

Id. at 1001, 690 (quoting I.C. § 39-4404).

> I.C. § 39-4405 further provides that the Board of Health and Welfare "adopt such rules and regulations as are necessary and feasible for the management of post generation handling, collection, transportation, treatment, storage and disposal of hazardous wastes *within the state*." (emphasis added)

Id.

> Importantly, I.C. § 39-4419 reads: "The director [of the Idaho Department of Health and Welfare] shall have the power and the duty to encourage cooperative activities between the department and other states for the improved management of hazardous wastes, and so far as is practical, *to provide for uniform state regulations* and for interstate agreements relating to hazardous waste management." (emphasis added)

Id. at 1001, 690. The Court found that this language "evince[d] a strong legislative intent" that hazardous waste disposal be regulated by a "uniform statewide scheme" and that it "preempt[ed] the field and preclude[d] local governmental regulation of the subject matter." *Id.*

In addition to the strong legislative intent demonstrated by the above-cited language, the Court found that the HWMA "is a comprehensive statutory scheme of the kind which implicitly evidences legislative intent to preempt the field." *Id.* In so finding, the Court found persuasive that the HWMA provided for "regulation, trip permits and a manifest system for those who transport hazardous waste; it further regulates a permit system for hazardous waste facilities and provides recording and reporting requirements for generators and facilities, fee systems and dedicated funds for emergency responses, and monitoring are also provided." *Id.* (citations omitted). It also found persuasive that the HWMA contained "sections dealing with citizen suits, local governmental notice, interstate cooperation, employment security, as well as broad enforcement provisions." *Id.* (citations omitted).

In finding that the Idaho legislature "acted in an all-encompassing fashion towards regulating the field of hazardous waste disposal" the Court noted the ordinance was "largely duplicative of the HWMA....Such extensive duplication leads to the inescapable conclusion that the area has already been fully regulated and the fields sought to be covered by the ordinance already occupied by the HWMA." *Id.* at 1001-02, 690-91. The Court further stated that "[w]here a statute and an ordinance are identical it is obvious that the field sought to be covered by the ordinance has already been occupied by state legislation." *Id.* (citing *Pipoly v. Benson*, [20 Cal. 2d 366] 125 P.2d 482, 485 (Cal. 1942)).

Finally, because Idaho has few facilities to handle hazardous waste, and its treatment and storage "is a subject which inspires a unique amount of interest and concern from this state's

citizenry" the Court found that the field of hazardous waste disposal "is fraught with such unique concerns and dangers to both the state and the nation that its regulation demands a statewide, rather than local, approach." *Id.* at 1002, 691.

The Court analyzed the field of PCB disposal separately, finding that PCBs are regulated by the HWMA and are therefore preempted. Bolstering the Court's decision regarding preemption of the field of PCBs was the Department of Health and Welfare's solid waste management regulations "wherein authority to regulate PCBs through 'conditional use permits' is granted." *Id.* at 1003, 692. In addition, it stated that the regulations "'have the force and effect of law.'" *Id.* (quoting I.C. § 39-107(8)). The Court further found that "[t]he regulations evidence intent that the Department of Health and Welfare and not, implicitly, other governmental entities, has primacy over such regulation." *Id.* Finally, the Court stated that "[t]he regulations are, themselves, comprehensive and evidence a textually demonstrable commitment by the state to regulate the field uniformly on a statewide basis." *Id.* at 1004, 693.

The Supreme Court of Idaho also discussed implied preemption in *Benewah County Cattlemen's Ass'n, Inc. v. Bd. of County Comm'rs of Benewah County*, 105 Idaho 209, 668 P.2d 85 (1983). In *Benewah*, the county enacted an ordinance prohibiting livestock from running at large and requiring fencing where livestock is grazed. *Id.* at 211, 87. The Benewah County Cattlemen's Association argued, among other things, that the ordinance was invalid because the county did not have authority to prohibit "'open range grazing' throughout the county, except and unless herd districts are created pursuant to [Idaho Code]; that the area of control of free roaming livestock has been preempted by legislative enactments, hence the ordinance conflicts with the general law of the state in violation of Idaho Constitution, art. 12, § 2...." *Id.* at 211-12, 87-88.

The Court held that the Legislature did not preempt the field of livestock control, analyzing the law relating to herd districts. In addition, the Court stated that:

> ... even assuming some legislative exercise of livestock control, we hold that extension or amplification of that control by county ordinance is not prohibited in the absence of constitutional or statutory provisions clearly evidencing intent on a statewide basis to permit livestock to freely roam and graze regardless of the ownership or the character of lands.

Id. at 213, 89. Further, the Court found that "even if it be assumed for the purpose of discussion that the herd district statutes in some degree addressed the same problems as those addressed by the county ordinance, local enactments which merely extend the state law by way of additional restrictions or limitations are not invalid." *Id.* at 214, 90.

B. The IDA/ICA's Argument.

In beginning an analysis of the IDA/ICA's legal position regarding preemption, it is probably best to begin with clarifying what the IDA/ICA appear to base their argument upon. This belief is that there are two (2) kinds of planning and zoning. The first method of planning and zoning is described by the IDA/ICA as "traditional." IDA/ICA concede that traditional planning and zoning is both appropriate and legal under the LLUPA. (Tr. 25-26 and 48). There is a second kind of planning and zoning, according to the IDA/ICA, that the counties may not engage in (at least as far as CAFOs are concerned). This method of planning and zoning is done "in the name of protecting water quality." (Tr. 26). Water quality, the argument goes, is "clearly left to the state to manage" and therefore the counties are preempted from even considering water quality as it relates to CAFOs. (Tr. 26). Hence, the IDA/ICA attack three (3) aspects of the Gooding County ordinance – animal density, prevention of siting within one (1) mile of canyon rims, and prevention of siting within one-half (½) mile of a Zone A floodplain on the theory that these sections relate to water.

The Idaho Association of Counties submits that the IDA/ICA's analysis is flawed on a number of levels. First, the Counties, as will be seen below, are specifically charged by state law to take into consideration water quality in the formation of their comprehensive plans and zoning ordinances, irrespective of whether the planning and zoning deals with CAFOs, power plants, agricultural uses, or other factors, without differentiation. Second, the board of county commissioners elected to look after the health, safety and welfare of the county citizenry must take into consideration much more than water quality within the fence line of a CAFO. These considerations in the context of water and water use include such diverse issues as hydropower, availability of ground water, flooding, recreational use, geological fragility of shorelines, species protection, and other considerations. Simply put, the counties are not in a position to divorce the matter of "water quality" from the role of proper planning and zoning.

In addition, the state and its agencies are not equipped to engage in the on-the-ground planning and zoning that is required under LLUPA, nor is there any state law that even remotely grants to a state agency the kind of planning and zoning duties required of county boards of commissioners.

Finally, as will be seen below, there is not a scintilla of evidence of legislative intent indicating an implied attempt at covering the entire field of CAFO regulation as to water and, indeed, there are numerous instances where the legislature has specifically stated the opposite.

C. The Federal Law.

IDA/ICA focused upon state regulation as the basis of their preemption argument in the district court. On appeal, IDA/ICA seem to be expanding their argument. IDA/ICA now seem to be asserting that federal and state law must be taken together and when so considered, the argument goes, implied preemption is logically concluded.

In considering the federal-state preemption argument, it should first be noted that the National Pollutant Discharge Elimination System (NPDES) referred to on page 4 of the IDA/ICA's Brief does not apply to all CAFOs. In fact, only those CAFOs that discharge pollutants into the surface waters of the United States or who propose to discharge pollutants need concern themselves with NPDES permits. Further, ground water quality considerations are not covered by the NPDES system.

Next, IDA/ICA rely upon the Idaho Dairy Waste Initiative Memorandum of Understanding between the Division of Environmental Quality (DEQ), the Environmental Protection Agency (EPA), the Idaho Dairymen's Association, Inc. (IDA), and the Department of Agriculture (DOA). This Memorandum of Understanding (MOU) apparently was entered into in order to help prevent pollution of surface water. In essence, it appears to be a method whereby the federal government has satisfied itself that dairies are in compliance with federal law. An MOU, of course, is a nonbinding agreement – even upon the signatories. It is submitted that the MOU, while certainly good government, cannot be used as "proof" that either the state or the federal government has covered the field of water quality considerations as to CAFOs.

D. The Dairy Act.

IDA/ICA cite Idaho Code § 37-401, *et seq.*, (the Dairy Act), which places upon the DOA the duty that is telegraphed in the title – Sanitary Inspection of Dairy Products. The vast majority of the thirteen (13) statutes contained in the Dairy Act deal with issues of inspection and safety of milk and how it is held and transported. Although cited by the IDA/ICA as evidence of the extensive regulation of water quality, there is actually very little in the Dairy Act from which to draw that conclusion. Idaho Code § 37-401[(4)] does state that "[a]ll dairy farms shall have a nutrient management plan" and requires dairy farms to submit the plans to the DOA.

Significantly, the same section also states "[t]he information provided in this subsection shall be available to the county in which the dairy farm, or the land upon which the livestock waste is applied, is located." Although the Dairy Act does not specifically state why the county should be given such information as a matter of mandatory state policy, it is submitted that the answer is *obvious*: so that the counties can take the nutrient management plan information into consideration when engaging in its planning and zoning duties as they apply to CAFOs.

In addition, the Dairy Act references the issuance of permits to sell milk for human consumption to "expanding dairy farms." Idaho Code § 37-401[(6)]. The DOA will only issue such permits when they have received a certified letter from the board of county commissioners certifying that the expanding dairy farm is in compliance with applicable county livestock ordinances. Expanding dairy farms are further described as dairy farms that increase their existing animal units beyond the number for which they are permitted under the "applicable county livestock ordinances" or that increase their waste containment systems. Idaho Code § 37-401[(7)](b). In other words, not only does the Dairy Act not imply that the state intends to fully regulate animal unit density within CAFOs, it states precisely the opposite. No permit will be issued by the state unless the counties conclude that their ordinances have been complied with.

In addition, Idaho Code § 37-406 requires the DOA to "advise and assist and to cooperate with ... counties ... in the exercise of any of the powers and duties of the department." It is submitted that the words "advise," "assist," and "cooperate" cannot be used to imply legislative intent to fully regulate to the exclusion of counties. Simply put, the IDA/ICA may not rely on the Dairy Act to support their position regarding preemption.

E. Rules Governing Dairy Waste.

IDAPA 02.04.14 contains a series of rules governing dairy waste. This Rule requires every dairy to have a Nutrient Management Plan (NMP) which is defined in Temporary Rule 02.04.14.010.14 as a:

> [P]lan prepared in conformance with the Nutrient Management Standard or other equally protective standard approved by the Department for managing the amount, source, placement, form, and timing of the land application of nutrients and soil amendments for plant production, and for minimizing the potential for environmental degradation, particularly impairment of water quality.

Waste containment and storage is regulated as to containment structures and soil testing, and analysis is required. Failure to comply with the Rules may result in suspension of a milk producers permit to sell milk.

Nothing contained in the Rule can be used to assert pervasive regulation as to water quality. While there is reference to water quality in the definition of an NMP, such reference is only by way of example and the definition implies other potential environmental degradation. The Rules do not attempt to describe levels of degradation of water quality and contains nothing indicating intent to prevent counties from taking water quality into consideration in their planning and zoning activities.

F. The Beef Cattle Act.

The Beef Cattle Environmental Control Act, Idaho Code § 22-4901, *et seq.*, (the Beef Cattle Act), passed in 2000 and amended somewhat in 2001 and 2004, is designed to place under the Department of Agriculture the duty to meet the goals of the Federal Clean Water Act and state laws designed to further protect state waters. However, the legislature has admonished the DOA that it may not expand upon the Federal Clean Water Act or state laws. Idaho Code § 22-4902(2). The mechanism for protecting water is set forth in Idaho Code § 22-4906, which

requires every CAFO to have a NMP approved by DOA. This NMP is defined as a plan in conformance with 40 C.F.R. § 122.42(e)(1). Idaho Code § 22-4904(11). In essence, the Beef Cattle Act is designed to keep manure out of water, but only that water "within the confines of a beef cattle animal feeding operation." Idaho Code § 22-4902(2).

Conspicuously absent from the Beef Cattle Act and the aforementioned C.F.R. section, is any language implying that a county cannot make laws controlling the number of animal units within the confines of the CAFO, nor is there any language suggesting that a CAFO may be placed on a lakeshore or river shore, floodplain or canyon rim solely on the basis of having obtained an approved NMP.

It is submitted that the IDA/ICA rely primarily on preamble language found in Idaho Code § 22-4902 pertaining to legislative intent. This statement of intent, the argument goes, demonstrates that the counties have no place in the regulation of CAFOs. IDA/ICA in particular focus upon language stating that the "department shall have authority to administer all laws to protect the quality of water within the confines of a beef cattle animal feeding operation." Idaho Code § 22-4902(2).

This argument can be met in three (3) ways. First, a preamble of statute is indicative of legislative purpose only, and is not conclusive and does not confer or enlarge powers. *Idaho Commission on Human Rights v. Campbell*, 95 Idaho 215, 506 P.2d 112 (1973). Second, preamble language that conflicts with more specific unambiguous statutory provisions must give way to the more explicit statutory provisions. *Campbell, supra.* Third, granting the DOA the power to administer laws is not the same as depriving the counties from administering their own laws. Put another way, when the legislature created the Idaho State Police and gave that agency the power to enforce state law, no one suggested that county sheriffs were out of business. As

long as counties pass laws that are not in conflict with state statutes, they should be able to decide their own destinies.

G. Rules Governing Beef Cattle Animal Feeding Operations.

The Department of Agriculture has adopted rules governing animal feeding operations and beef cattle animal feeding operations (which are not the same thing). IDAPA 02.04.15. The Rules require beef cattle animal feeding operations to have nutrient management plans and records, allow the DOA to "designate" beef cattle animal feeding operations when such an operation is a "significant contributor of pollution to waters of the state" (which apparently demonstrates that not all cattle operations fall within the requirement for NPDES permitting) and sets standards for waste water storage, inspection and compliance. Again, notably absent is any language regarding density, siting within one (1) mile of canyon rims, or siting on a floodplain.

H. The Local Land Use and Planning Act (LLUPA) and The CAFO Siting Act.

IDA/ICA argue that the LLUPA "merely provides counties with the planning and zoning authority to enact ordinances to 'encourage consistent appearance, protect property values and promote the best use of property'." (IDA/ICA Brief, p. 21). This, the argument goes, is the traditional function of zoning ordinances. The authority to site a CAFO, we are told, does not extend to regulating water quality at CAFOs. We are further told that a county may only concern itself with setbacks, lot coverage limitations, building heights, and lot depth requirements. *Id.*

It is submitted that LLUPA is considerably more broad in its application than the IDA/ICA suggest. One need look no further than Idaho Code § 67-6502 for a demonstration that IDA/ICA's arguments wildly understate the purposes of the LLUPA. The purpose of the LLUPA is:

> [T]o promote the health, safety, and general welfare of the people of the state of Idaho as follows:
> ... (d) To ensure that the important environmental features of the state and localities are protected.
> ... (h) To ensure that the development on land is commensurate with the physical characteristics of the land.
> .... (j) To protect fish, wildlife, and recreation resources.
> ... (k) To avoid undue water and air pollution. ....

Idaho Code § 67-6502. "[T]he legislature obviously intended to give local governing boards ... broad powers in the area of planning and zoning. Commensurate with their planning responsibilities, county commissioners, pursuant to I.C. § 67-6518, may establish standards for a wide variety of projects and activities ... ." *Worley Highway Dist. v. Kootenai County*, 104 Idaho 833, 835, 633 P.2d 1135 (Ct. App. 1983). See also *White v. Bannock County Commissioners*, 139 Idaho 396, 80 P.3d 332 (2003) (the legislature intended to give local governing boards broad powers in the area of planning and zoning). Beyond doubt, counties are authorized to adopt ordinances which regulate land use. *Ralph Naylor Farms, LLC, v. Latah County*, 144 Idaho 806, 811, 172 P.3d 1081 (2007).

LLUPA requires the implementation and updating of comprehensive plans in each county.

> The plan shall include all land within the jurisdiction of the governing board. The plan shall consider previous and existing conditions, trends, desirable goals and objectives, or desirable future situations for each planning component.

Idaho Code § 67-6508. The plan must include considerations of natural resources – "[a]n analysis of the uses of rivers and other waters, ... thermal waters, beaches, watersheds, and shorelines." Idaho Code § 67-6508(f). Public services, facilities and utilities must also be considered – "[a]n analysis showing general plans for sewage, drainage, ... water supply, ... solid waste disposal sites, ... and related services." Idaho Code § 67-6508(h). Recreation is also

to be taken into account – "[a]n analysis showing a system of recreation areas, including parks, parkways, trailways, river bank greenbelts, beaches, ... and other recreation areas and programs." Idaho Code § 67-6508(j). Special areas such as "areas, sites, or structures of historical, archeological, architectural, ecological, wildlife, or scenic significance" must be considered. Idaho Code § 67-6508(k). Perhaps most important, nothing in the comprehensive plan statute "shall preclude the consideration of additional planning components or subject matter." Idaho Code § 67-6508.

In accordance with the comprehensive plan, zoning ordinances must be adopted in accordance with the policies set forth in the comprehensive plan and must "establish standards to regulate and restrict ... the location and use of buildings and structures." Idaho Code § 67-6511.

LLUPA provides for the adoption of standards for, among other things, access to streams, lakes and viewpoints; water systems, sewer systems, and storm drainage systems. Idaho Code § 67-6518. "The state of Idaho and all its agencies, boards, departments, institutions and local special purpose districts shall comply with all plans and ordinances adopted under this chapter unless otherwise provided by law." Idaho Code § 67-6528.

The IDA/ICA seize upon one subsection from LLUPA – Idaho Code § 67-6529(1) – which states in pertinent part that counties may not enact an ordinance depriving an owner of full and complete use of agricultural land for production of any agricultural product. Although it is not clear, IDA/ICA seem to argue that this subsection is evidence that Gooding County has no power to "regulate" CAFOs because water quality issues are involved. IDA/ICA ignore two (2) important points. First, the subsection goes on to state "[a]gricultural land shall be defined by local ordinance or resolution." Idaho Code § 67-6529(1). It would seem logical that counties can define CAFOs as something separate and distinct from agricultural land growing potatoes or soy

beans. In addition, this subsection must be read in harmony with the rest of the LLUPA. If anything is certain, someone engaged in agriculture, while certainly having the ability to have full and complete of the land for agricultural purposes, is not in a position to ignore the remainder of the LLUPA. This subsection does not give a "carte blanche exemption from all county zoning ordinances." *Olson v. Ada County*, 105 Idaho 18, 21, 665 P.2d 717 (1983). In any event, IDA/ICA have ignored the remainder of Idaho Code § 67-6529 which states in pertinent part:

> Notwithstanding any provision of law to the contrary, a board of county commissioners shall enact ordinances and resolutions to regulate the siting of large confined animal feeding operations and facilities, as they shall be defined by the board, ... including the approval or rejection of sites for the operations and facilities. ... A board of county commissioners may reject a site regardless of the approval or rejection of the site by a state agency.

Idaho Code § 67-6529(2).

Placed in the middle of LLUPA is the "Site Advisory Team Suitability Determination Act." Idaho Code §§ 67-6529A through 67-6529G. Adopted by the legislature in 2001 (significantly, a year after the legislature adopted the preamble language in the Beef Cattle Act that IDA/ICA rely so heavily upon), this Act grants broad powers to the counties regarding CAFOs. The legislature found that CAFOs "increase social and environmental impacts in areas where the facilities are located ... ." Idaho Code § 67-6529B(1). In other words, counties have more to consider than just whether the CAFO has obtained an NMP and whether the DOA is administering laws within the confines of the CAFO fence. The legislature also found that the siting of confined animal feeding operations is complex and technically difficult requiring assistance to counties "as they exercise their land use planning authority." Idaho Code § 67-6529B(2). In other words, counties are still in charge of their own destiny when dealing with CAFOs. The state is there to assist, not preempt. The Act contemplates the formation of a

CAFO advisory team made up of state agencies. The DOA is the lead agency for the team. Idaho Code § 67-6529C(2). The team is to assess environmental risks, which "shall mean that risk to the environment deemed posed by a proposed CAFO site, as determined and categorized by the CAFO site advisory team and set forth in the site advisory team's suitability determination report ... ." Idaho Code § 67-6529C(3). In other words, there is much more for the team and county to worry about than whether or not an NMP is in the offing. Among those considerations is odor management. Idaho Code § 67-6529D(1).

Upon the request of a board of county commissioners, the Director of DOA "shall form and chair a site advisory team specific to the request of the county." Idaho Code § 67-6529F(1). The board of county commissioners requesting the suitability determination may use the team's report "as the county deems appropriate." Idaho Code § 67-6529G. Finally, "this act does not preempt local regulation of a CAFO." Idaho Code § 67-6529D(3).

The DOA has adopted rules governing the advisory team. IDAPA 02.04.18. The DOA may form an advisory team even if the operation does not meet the technical definition of a CAFO when the "site is in an environmentally sensitive area or is in close proximity to streams, lakes, or other bodies of surface water...." IDAPA 02.04.18.100.02(a). Vicinity maps are required by DOA when a request to form a team is made. Flood zones, wells, canals, laterals, rivers, streams, springs, lakes, reservoirs and wetlands must all be included on the map. IDAPA 02.04.18.300.05. All sorts of water quality data must also be referenced including data from the DEQ. IDAPA 02.04.18.300.06. All this information is gathered so the state may advise the counties.

It is submitted that if anything is apparent it is that counties may accept or reject CAFOs as a matter of law and refuse to allow them to be located within areas the county deems to be unsuitable – such as within one (1) mile of a canyon rim or on a floodplain.

Finally, LLUPA contains a section which is designed to "encourage the use of surface water for irrigation." Idaho Code § 67-6537(1). When considering amending, repealing or adopting a comprehensive plan, counties "shall consider the effect of the proposed amendment, repeal or adoption of the comprehensive plan would have on the source, quantity and quality of ground water in the area. Idaho Code § 67-6537(4).

I. County Law.

The Idaho Constitution states that county officers shall perform such duties as prescribed by law. Idaho Constitution, Article XVIII, § 11. Hence, it has been held that county commissioners have only such power as conferred by statute. *Shillingford v. Benewah County*, 48 Idaho 447, 282 P. 864 (1929). However, it is also clear that new powers and duties may devolve upon the counties from time to time, and this is authorized under the state constitution, particularly Article XVIII, sections 6 and 11. *State ex rel. Wright v. Headrick*, 65 Idaho 148, 139 P.2d 761 (1943).

Every county is a body politic incorporate, and has powers as specified in statutes "and such powers as are necessarily implied from those expressed." Idaho Code § 31-601. Counties may make and enforce such police, sanitary and other regulations as are not in conflict with their charter or with the general laws. Idaho Constitution, Article XII, § 2. Ordinances which merely go further than a state statute in imposing additional regulation of a given conduct do not necessarily conflict with state law and are not rendered invalid by Article XII, section 2, Idaho Constitution. *Voyles v. City of Nampa*, 97 Idaho 597, 548 P.2d 1217 (1976). It is axiomatic that

the state and a county may have concurrent jurisdiction over the same subject matter. *State v. Poynter*, 70 Idaho 438, 220 P.2d 386 (1950). The legislature has found that such power is broad and includes "such other and further authority as may be necessary to effectively carry out the duties imposed on it by the provisions of the Idaho Code and constitution." Idaho Code § 31-604. County commissioners may:

> [P]ass all ordinances and rules and make all regulations, not repugnant to law, necessary for carrying into effect or discharging the powers and duties conferred by the laws of the state of Idaho, and such as are necessary or proper to provide for the safety, promote the health and prosperity, improve the morals, peace and good order, comfort and convenience of the county and the inhabitants thereof, and for the protection of property therein ... .

Idaho Code § 31-714.

J. There is No Field Preemption in This Matter.

IDA/ICA apparently argue that the mere acquisition of an NMP in compliance with the state and federal laws regarding discharge of pollutants into the surface waters of the United States should immunize them from all local regulation that might somehow touch upon "water quality." Even though the Idaho Code specifically grants to the counties the power to determine where CAFOs may be placed and grants to commissioners broad powers as to how they should be regulated, these powers, the IDA/ICA argue, are trumped whenever issues of water quality come up. Hence, the IDA/ICA apparently are arguing that specifically drafted ordinances dealing with siting of CAFOs, based upon specific state statutes, are void if they have anything to do with the IDA/ICA's broad definition of "water quality." This is perhaps most starkly illustrated by the IDA/ICA's objection to the Gooding ordinance pertaining to location of CAFOs in proximity to floodplains. Although IDA/ICA never clarify what the issue is, apparently the

thinking is that floodplains must have something to do with water. Anything to do with water, the argument continues, is of no concern of the commissioners.

The reality, of course, is that when 100 year storms occur, the flooding created by excess runoff will generally follow preexisting paths. That is why they are called floodplains. In the interest of the health and safety of the citizens of Gooding County, it should be beyond argument that the commissioners have the right and duty to be concerned that in the event of a 100 year storm the manure of thousands of beef cattle and dairy cows might flood into the Snake River or the backyards of the citizens of Hagerman. This, of course, has literally nothing to do with whether the dairy happens to have an NMP that has been approved by the state, or whether it is following its NPDES permit.

The same applies to the issue of density or canyon rims. The CAFO ordinance on its face shows that the commissioners had much more to consider than "water quality." Such considerations include conservation of agricultural land (R. 20), contamination of agricultural soil (R. 21), obnoxious odors, pests, dust, and airborne contaminates (R. 21). The fact that the commissioners are also concerned with contaminated wells or aquifers does not mean that the aforementioned non-water related concerns are to be ignored or overridden.

In any event, IDA/ICA argument fails on the law. IDA/ICA rely very heavily on *Envirosafe Serv. of Idaho, Inc., v. County of Owyhee*, 112 Idaho 687, 735 P.2 998 (1987). That case, of course, dealt with PCB disposal and had nothing to do with CAFOs. In *Envirosafe*, the county promulgated an ordinance which was virtually a verbatim copy of state law, with the addition of a fee that was imposed on hazardous waste sites. Given that the ordinance and the Act went to identical issues, the court had little trouble finding that the state had preempted local law, especially because of the pervasive manner in which the Act handled the treatment of PCBs.

In this case, as is demonstrated above, the state laws and rules not only do not expressly deal with density, location near floodplains, and location near canyon rims, it cannot even be inferred that the drafters of the state laws took such things into consideration. If anything, it appears that the legislature took exactly the opposite approach to that argued by the IDA/ICA when they specifically granted the power to site CAFOs to the counties and set up a mechanism to have the state advise and cooperate with the counties.

Of course, the county in no way has attempted to duplicate or tinker with federal and state clean water laws. The ordinance simply states that if one wishes to operate a CAFO in Gooding County he needs to follow the state and federal laws regarding "water quality" in the sense of having an NMP and NPDES permit. Under those conditions, there is certainly no conflict that would some how jeopardize the validity of the ordinance. Nor have IDA/ICA identified any specific conflict.

Simply put, the state and federal law is silent on the issues regulated under the ordinance regarding density, canyon rims, and floodplains, and do not imply anything that is contrary to what Gooding County has done in its ordinance on the issues.

K. Preemption is Neither Required Nor Desirable.

The IDA/ICA also cite *Envirosafe* for the proposition that regulation of CAFOs at the statewide level is demanded. The IDA/ICA conjure up a "patchwork of inconsistent and varied local requirements in each of Idaho's forty-four 44 counties." (IDA/ICA's Brief, p.24). Apparently, the court is invited to draw the conclusion that different regulations, in different counties, based upon different concerns is a bad thing. In response, the counties point out that there are likely to be significant differences between a proposed CAFO on the Owyhee desert and proposed CAFO alongside Priest Lake. In any event, since most CAFO operations are of

necessity finite in size, should a corporation choose to site two CAFOs in two different counties, it would be a small thing to follow local regulation.

The language used by the court in *Envirosafe* in reaching the conclusion that hazardous waste management demanded statewide regulation bears repeating. The court spoke of the field of hazardous waste disposal as "fraught with such unique concerns and dangers to both the state and the nation that its regulation demands a statewide, rather than local, approach." *Envirosafe*, 112 Idaho at 691. The court went on to quote *Township of Cascade v. Cascade Resource Recovery, Inc.*, 325 N.W.2d 500 (Mich. 1982), where it pointed out that "[t]he Legislature recognized that hazardous waste disposal areas evoke such strong emotions in localities that the decision as to where a landfill should go should not be given to the locality, which is far more swayed by parochial interests than the state." 325 N.W.2d at 504 (emphasis added).

Although the court in *Envirosafe* was careful to say that it was not denigrating local governments, it held as a matter of policy that in the area of hazardous waste management, and because the legislature had already acted, statewide control would trump local control.

Obviously, there is no parallel to the *Envirosafe* case that may be found here. It is useful to note that the numerous cases cited by the IDA/ICA in support of their position deal with such matters as hazardous waste, massage parlors, mobile homes and pornography. The IDA/ICA are not able to point to a single case or a single state statute anywhere in the nation that supports the position that CAFOs should be regulated only at the state level. Moreover, as is demonstrated above, the legislature has not acted to regulate at the state level as it had in the *Envirosafe* case.

III.

CONCLUSION

Planning and zoning is something engaged in by county commissioners and zoning boards throughout the state on a regular basis. Planning and zoning is not engaged in by the state and never has been. County commissioners must comply with comprehensive plans. The state does not have a comprehensive plan for the legislature to follow in making zoning decisions. The notion that the legislature has secretly set up a regime whereby county commissioners cannot take into account where CAFOs should be placed within their counties because some CAFOs must follow state and federal law in regard to water pollution is a notion that defies the explicit language found in LLUPA and is no way supported by the Dairy Act, the Beef Cattle Act, Rules promulgated under those acts or the federal law. The notion that state CAFO regulation is "demanded" because "parochial" counties are not up to the task, and the claim that local CAFOs will be somehow affected by a "patchwork" of ordinances across the state are both notions that are lacking in foundation under the law and the realities of modern county governmental life. It is respectfully submitted that this court should reject IDA/ICA's argument that the state has impliedly preempted the field of CAFO regulation as it applies to "water quality" both as a whole and as to the limited sense applied by the IDA/ICA. It is also requested that the court reject the notion that preemption is "demanded."

DATED this 20th day of May, 2009.

MICHAEL KANE & ASSOCIATES, PLLC

BY: Michael Kane

MICHAEL J. KANE
Attorneys for Idaho Association of Counties, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th day of May, 2009, I caused to be served a true and correct copy of the foregoing document by the method indicated below and addressed to the following:

Attorneys for Appellants (IDA/ICA):	___X__ U.S. Mail
Mr. Kenneth R. McClure	_____ Hand Delivery
Ms. Debora K. Kristensen	_____ Overnight Mail
Mr. J. Will Varin	_____ Facsimile
Givens Pursley, LLP	
601 West Bannock Street	
P.O. Box 2720	
Boise, ID 83701-2720	
Attorneys for Respondent (Gooding County):	___X__ U.S. Mail
Mr. Calvin H. Campbell	_____ Hand Delivery
Mr. John L. Horgan	_____ Overnight Mail
Gooding County Prosecuting Attorney's Office	_____ Facsimile
624 Main Street	
P.O. Box 86	
Gooding, ID 83330	
Filing Amicus Curiae Brief (Cassia County):	___X__ U.S. Mail
Mr. Alfred E. Barrus	_____ Hand Delivery
Mr. Blaine P. Cannon	_____ Overnight Mail
Mr. Robert Hemsley	_____ Facsimile
Cassia County Prosecuting Attorney's Office	
1918 Overland Avenue	
P. O. Box 7	
Burley, ID 83318	

Michael J. Kane

MICHAEL J. KANE